H.E. NO. 2013-2

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST WINDSOR REGIONAL BOARD OF EDUCATION,
Respondent,
-and-
EAST WINDSOR EDUCATION ASSOCIATION,
Charging Party.

Docket No. CO-2010-008

EAST WINDSOR REGIONAL BOARD OF EDUCATION,
Charging Party,
-and-
EAST WINDSOR EDUCATION ASSOCIATION
Respondent.

Docket Nos. CE-2010-003
& CE-2010-005

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds in CO-2010-008, that the East Windsor Regional Board of Education did not violate the New Jersey Employer-Employee Relations Act when its Superintendent met with the Music Teacher regarding marching band positions. The Hearing Examiner concluded the Board did not circumvent its negotiations obligation with the Association or deal directly with an employee regarding terms and conditions of employment.

The Hearing Examiner finds in CE-2010-005, however, that the East Windsor Education Association violated the Act by failing to comply with the parties previously agreed upon ground rules for negotiations. The Hearing Examiner recommended the Association apologize for its action among other recommendations.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2013-2

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST WINDSOR REGIONAL BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2010-008

EAST WINDSOR EDUCATION ASSOCIATION,

Charging Party.

EAST WINDSOR REGIONAL BOARD OF EDUCATION,

Charging Party,

-and- Docket Nos. CE-2010-003
& CE-2010-005

EAST WINDSOR EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Board of Education
David B. Rubin, P.C., attorney

For the Association
Wills, O'Neill & Mellk, attorneys
(Arnold M. Mellk, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 2 and 20, 2009, the East Windsor Education Association (Association) filed an unfair practice charge and amended charge, respectively, with the New Jersey Public Employment Relations Commission (Commission or Agency)

(CO-2010-008), alleging that the East Windsor Regional Board of Education (Board) violated subsections 5.4a(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The Association alleged that the Board through its Superintendent engaged in direct dealing with a teacher to increase stipends for marching band positions.

On August 17, 2009, the Board filed an unfair practice charge with the Commission (CE-2010-003) alleging that the Association violated subsections 5.4b(2) and (3)[2/] of the Act. The Board alleged that Association President Ellen Ogintz engaged in direct dealing with a Board member regarding a personnel matter.

On October 6, 2009, the Board filed another unfair practice charge with the Commission (CE-2010-005) alleging the Association

---

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ These provisions prohibit employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

violated subsection 5.4b(3) of the Act, claiming the Association violated previously agreed upon ground rules for negotiations for a new collective agreement.

Both parties seek remedies appropriate for their respective cases.

Procedural History

A Consolidated Complaint and Notice of Hearing was issued on August 11, 2010. The Association filed an Answer on August 31, 2010 (Exhibit C-2)[3/] and the Board filed an Answer on September 9, 2010 (Exhibit C-3). Both parties denied having engaged in conduct violative of the Act.

Hearings were held on March 6 and 7, 2012. The hearings involved only CO-2010-008 and CE-2010-003. At the conclusion of the second day of hearing the Association moved to dismiss the Board's charge in CE-2010-003. I reserved on that motion (2T50-2T57).

The parties then agreed that the issues raised by CE-2010-005 could be resolved by motion for summary judgment because there was no dispute over material facts (2T58). Subsequently, by letter of March 28, 2012, the Board withdrew its charge in

---

3/ The following designations apply to documents and exhibits entered into evidence: "C" refers to Commission documents, "CPA" refers to documents proffered by the Association when it is the charging party, "CPB" refers to documents entered into evidence when the Board is the charging party, and "J" denotes exhibits jointly entered into evidence by the parties.

CE-2010-003.

The Board filed its motion for summary judgment with supporting documentation in CE-2010-005 on April 13, 2012. The Association filed its response in opposition with supporting documents on April 24, 2012. The Board filed a reply brief on April 30, 2012. Pursuant to N.J.A.C. 19:14-4.8(a), the Chair referred the motion to me for determination.

On May 9, 2012, the Association filed a brief without documentation noting it was in support of its motion for summary judgment in CO-2010-008. On or about May 21, 2008, the Board filed its brief in opposition to the allegation raised in CO-2010-008.

Since the Board withdrew its charge in CE-2010-003 several weeks after the March 7th hearing, there is no need to resolve the Association's motion to dismiss that charge. The Association's designation of its May 9th brief as a motion for summary judgment in CO-2010-008 is misplaced. A motion for summary judgment is filed prior to - and seeks to obviate the need for - a hearing. N.J.A.C. 19:14-4.8. Since the hearing in CO-2010-008 was completed before the Association's May 9th submission was filed, I will treat that submission as the Association's post-hearing brief in that matter and decide the case based upon the evidence produced at hearing and arguments raised in the briefs.

Finally, I note that to the extent the Association's April 24th brief in opposition to the Board's motion for summary judgment in CE-2010-005 attempts to raise or put material facts in dispute, such arguments cannot now prevent the resolution of that case through summary judgment. On March 7, the parties stipulated that there was no dispute over material facts in that case. The Board relied upon the Association's representation therein in filing its motion for summary judgment (2T58). I intend to hold the parties to the representations made on the record. Reopening the hearing at this point would be administratively inefficient.

Based upon the entire record, I make the following:

FINDINGS OF FACT

CO-2010-008

1. The Board and Association have been parties to collective negotiations agreements covering non-supervisory professional certificated employees employed by the Board. Both the July 1, 2006 - June 30, 2009 (Exhibit J-1) and July 1, 2009 - June 30, 2012 (Exhibit J-2) collective agreements contain a list of extra pay or stipended positions which included a stipend for Marching Band Director and Assistant Director. Stipends are also provided for a number of other music positions.

2. During the 2008-2009 school year, Ronald Bolandi was the Board's Superintendent, Ellen Ogintz was the Association's

President, and Robert Stein was employed by the Board as a music teacher (1T16, 1T105, 1T161). In late winter or early spring of 2009, the Board appointed Stein the band director for the upcoming school year (1T161). Negotiations for a new collective agreement between the Board and Association was proceeding during that same time frame (1T16).

3. Prior to Stein's appointment to band director, the marching band program was a non-competitive program conducted during the school day. Tom Juzwiak was the band director. Sometime during the 2007-2008 school year Juzwiak and Bolandi had a conversation about the marching band becoming an after school competitive activity. During one of their discussions Juzwiak raised the stipend issue and Bolandi told Juzwiak he (Bolandi) could not negotiate money with him, that issue had to go to the Association (1T111-1T112). I credit Bolandi's testimony.

By the end of the 2007-2008 school year the Board had not decided to make the marching band an after school program. Juzwiak resigned as band director sometime during the late winter or early spring of the 2008-2009 school year (1T112).

4. After Juzwiak resigned the band director position - but before April 30, 2009 - the Board decided to make marching band an after school competitive program (1T113-1T114). Stein was interviewed and hired as the band director prior to April 30, 2009 (1T155-1T160). He asked Bolandi if he could give him

(Bolandi) input into what the after school program would look like and Bolandi agreed (1T117). Stein knew the band program was changing to an extracurricular (after-school) program and he had several ideas and issues to discuss with Bolandi. Stein believed certain positions needed to be created to support the program and he volunteered his idea about compensation for his and other positions (1T163). Bolandi did not invite Stein to discuss the compensation issue (1T121).

Bolandi acknowledged to Stein that he should be paid for his time, but he told Stein that he (Bolandi) could not discuss compensation with him (Stein) and he (Bolandi) directed Stein to discuss the compensation issues with Ogintz and the Association (1T118, 1T123, 1T164). Bolandi did not discuss the stipends with Stein after they were presented. Stein discussed compensation with the Association leadership (1T165).

Prior to April 30, 2009, Stein made Ogintz aware of his need to discuss his marching band ideas with Bolandi. Ogintz confirmed she knew those discussions involved a stipend for the band position that Stein had raised and she asked Stein to email her about the discussions (1T66-1T67).

5. In the morning of April 30, 2009, Stein sent Ogintz a copy of an email he had sent to Bolandi (Exhibit CPA-1) indicating he (Stein) had spoken to Ogintz, she was supportive

but wanted to know just what they discussed. In CPA-1, Stein wrote he had discussed:

> Changing Marching Band Director 9-12 to: Group A, Level C
>
> Changing Marching Bank Assistant Director 9-12 to: Group D, Level C

The "Group" and "Level" designations referred to extra pay stipend amounts in J-1 and J-2.

Later on April 30, 2009, Bolandi sent Ogintz a memorandum which stated in pertinent part:

> I understand Rob Stein spoke to you regarding the Marching Band stipend being adjusted and a new stipend to be added. He has given me his thoughts on what the salary should be and I have no problem making this recommendation to the BOE if the association agrees. [Exhibit CPA-2]

Ogintz confirmed she received Stein's proposed stipend changes in CPA-1 and that she was supportive of Stein's efforts to gather information (1T69, 1T71). She testified she did not have a problem with the discussions between Stein and Bolandi leading to CPA-1 or with the information that was actually exchanged on April 30, 2009 (1T72-1T73). Ogintz never told Stein or Bolandi she had a problem with their discussions or asked them to stop those discussions (1T73). I credit that testimony. Bolandi and Stein both confirmed that Ogintz never asked them to stop talking to one another about the band director position (1T157-1T158; 1T166)

6. On May 7, 2009, Stein sent an email to Bolandi and Ogintz (Exhibit CPA-3) attaching job descriptions for Band Director and Assistant Band Director. His email also noted a significant raise in the stipends for the positions. The last sentence of his third paragraph stated:

> As I understand it, now that this document will be passed on to the negotiations committee, things can move forward.

Ogintz had not authorized Stein to prepare job descriptions, and those descriptions were not prepared by the Association (1T20, 1T23). Ogintz thought Bolandi assisted Stein in preparing the job descriptions but offered no supporting evidence. Bolandi denied assisting Stein with the job descriptions (1T120, 1T123). Stein testified he received no assistance in preparing CPA-3 or the information contained therein (1T167). I credit Bolandi and Stein. Ogintz's comment was merely her thought of what occurred.

Just before noon on May 8, 2009, Stein emailed Ogintz with job descriptions for the band and assistant band director positions and a list of five extra pay positions for the band and stipends for those positions. That email, Exhibit CPA-4, provided:

> I have attached the Marching Band Director and Assistant Marching Band Director job descriptions for the negotiations committee to present at negotiations.
>
> As I understand it, EWEA has begun negotiations and any change to job descriptions and/or salaries requires

> justification and negotiation. At present, the Marching Band Staff list for stipends is ready to be negotiated with the previously attached job descriptions.
>
> I have attached the Marching Band Director and Assistant Marching Band Director job descriptions as you, Mrs. Ogintz, and I have discussed, in order for the positions of Marching Band Director and Assistant Marching Band Director to be negotiated.
>
> Thanks so much, please let me know if there is anything else you need from me.

The stipends for the marching band director and assistant director positions, and the stipends for the five extra positions totalled $16,050. The Association had no input into the amount of the stipends listed in the attachment to CPA-4 (1T26). Stein testified no one collaborated with him in compiling the information in or attached to CPA-4 (1T167-1T168). I credit his testimony.

Early in the afternoon of May 8, Ogintz responded to CPA-4 as follows:

> Perfect. Send it to Ron [Bolandi] first w/the cc to me, so that this part 'descriptions as you, Mrs. Ogintz, and I' refers to Ron as the 'you'. Then send me the final email. [Exhibit CPA-4A]

Ogintz sent CPA-4A because she said CPA-4 was incorrect where it gave the impression that Stein and Ogintz had discussed the job descriptions. In CPA-4A Ogintz was instructing Stein to correct CPA-4 to reflect he and Bolandi had discussed job descriptions, then she wanted Stein to send the corrected message

to Bolandi with a copy to her and a final email to her as well (1T27). Ogintz did not direct Stein to stop communicating the compensation information to Bolandi, in fact, she authorized it. Stein testified that he understood Ogintz' CPA-4A email to be instructing him to relay the job descriptions and stipend information to Bolandi (1T168-1T169). I credit that testimony.

7. Sometime between May 8 and June 4, 2009, Ogintz notified Stein that the Association negotiations committee would not present the band related stipends he suggested to the Board for the parties successor agreement (1T85).

In the late evening of June 4, 2009, Stein sent an email to Bolandi in the form of a letter addressed to parents, students and friends announcing his resignation as the Board band director and music teacher [Exhibits CPA-5 and CPB-1]. Stein gave his reasons in pertinent part as follows:

> I have received unbelievable amounts of unprofessional behavior, problems, and a huge lack of support from certain faculty members of the high school, as well as other members of my teaching association leadership, and parents as well. [CPA-5]

Stein wrote his resignation letter without any assistance but told Bolandi he (Stein) intended to resign before the letter was sent (1T170-1T171).

In the morning of June 6, 2009, Bolandi sent the following email to Ogintz with Stein's letter attached:

> Thanks for taking care of a good teacher and protecting a miserable SOB. You and Nardi did a great job. Please do not insult my intelligence and tell me it did not happen that way. Nice set up. I hope you two union people feel good about ending one of your members career. You and Nardi can not blame this one on ADMINISTRATION but I am sure you will try. [CPA-6]

Ogintz forwarded CPA-6 to Association representative Susan Nardi on June 8, 2009.[4/]

In the evening of June 6, 2009, Bolandi's secretary issued an email on behalf of Bolandi to Board members, school officials and many others that attached Stein's resignation letter [Exhibits CPA-5 and CPB-1]. Bolandi's email message is as follows:

> I am extremely distressed that Rob Stein, an excellent teacher and an outstanding asset to our district, has resigned BOTH his teaching and Marching Band positions. His resignation letter, which is below, speaks for itself. It is a sad day in EWRSD when one of our own graduates and product of our music program is driven out of the district by his colleagues, association leadership and certain parents.
>
> The adults won and our children lost!!! [CPA-5]

After Ogintz received CPA-6 and CPA-5 on June 6, she spoke to Stein about his comments that union leadership had not been helpful (1T172). Subsequent to that call and shortly after the

---

4/ Bolandi explained that the good teacher referred to in CPA-6 was Stein and the SOB was Juzwiak (1T134).

email in CPA-5 was issued, Stein issued the following email to Bolandi with a copy to Ogintz.

> I wanted to clarify something to you quickly - the association leadership was very helpful to me. In my meeting with Ellen Ogintz and Susan Nardi, they were very supportive and offered their help to me, and assured me they would do their best to address my concerns. My problem was with certain members fellow faculty members, or association, but not the leadership. I don't want people to get the wrong impression. Also, I heard Bob Laverty sent Tom an email mentioning something about the teachers at McKnight. The teachers at McKnight have ALWAYS been wonderful and nothing but supportive of my program there.
>
> If we could please clarify that, I would greatly appreciate it. Thank you.
> [CPA-7]

Less than an hour later, Stein sent the following email to Ogintz:

> It appears there have been some mixed signals here about the association leadership. You and Susan were very helpful. My issue was with certain association members at Drew and HHS. I have NEVER had a problem at EMK, and truly appreciate all of the support and care from my fellow faculty members there, as well as the principal and asst principal. If anyone asks you, please let them know of this error. I don't want people to get the wrong impression.
> [CPA-8]

In the early afternoon of June 7, 2009, Stein sent the following email to Bolandi essentially retracting remarks he made in CPA-7 and CPA-8.

> I would like to retract the previous email I sent you stating I felt the association

> leadership was fully supportive at the meeting I had with them. I had a conversation last night with an association member, during which time I felt scared and said what I thought was the right thing to say, rather than how I truly felt.
>
> Ultimately, I feel that my association did not fully support me in this situation. I met with two members of my association leadership, during which time I explained my problems to them. They told me it was their understanding someone would try to take care of it, and if anything else comes up to tell them and they would try to take care of it; but that "sometimes this is just how it is teaching public school." The tone of voice, body language, and general tone of the meeting, however, left me feeling unsupported and that no matter what I did nothing would improve. Maybe they were being supportive and trying their best; personally, I felt that the meeting served no purpose and that nothing was going to improve. This did impact me and played a factor in my resignation. [Bottom of CPA-9]

After receiving that message Bolandi later in the evening of June 7 sent the following email to Ogintz:

> Now who is telling the truth? I think we need to discuss what part you played in scaring Rob and why you did this before you and your leadership are discredited beyond repair. Do you really want to wreck this guy's career just because you do not want to admit that you or Nardi did not support him like you could have? I expect this from Nardi but not you. I believe Rob when he says something happened. Maybe you should reconsider your position before it is too late for everyone. He trusted you, you told him to complain and you failed him. He needs our help!! He is the one who has been wronged not you. [Top of CPA-9]

After the charges were filed in this matter, Ogintz and Bolandi sought to improve their relationship (1T49). On or about September 4, 2009, Bolandi drafted a letter [Exhibit CPA-10] for Ogintz apologizing for including reference to the Association in his emails regarding Stein's resignation. That draft was sent to Ogintz later on September 4 [Exhibit CPA-10A], but ultimately the letter was never signed or sent (1T53).

8. On direct examination Ogintz testified that Stein and Bolandi were talking about how much Stein was expecting to be paid for the band director position (1T99-1T100). But on cross-examination she confirmed that she supported Stein's discussions with Bolandi about the band program, knew that they were discussing compensation and stipends but was not uncomfortable with that process at that time, conceded she authorized Stein to send CPA-4 which contained stipend information to Bolandi, and that despite becoming uncomfortable with that process in early May 2009, she never instructed either Stein or Bolandi to stop those discussions (1T71-1T80). I credit that testimony.

CE-2010-005

9. In February 2009, the Board and Association began negotiations for an agreement to succeed J-2. On February 18, 2009, the parties signed an agreement establishing ground rules for negotiations. Paragraph 9 of the Ground Rules agreement provided:

> If an impasse is reached, the parties will attempt to reach a joint statement to be released to the public/press. If no agreement on a joint statement can be reached, the parties are free to individually make any statement deemed appropriate.

The parties conducted approximately nine negotiation sessions between February and June 2009, and reached and signed a memorandum of agreement (MOA) on June 16, 2009. By June 23, 2009, however, the Association had discovered that an issue regarding extra planning time for teachers had not been included in the MOA. The Association argued the issue was inadvertently omitted from the MOA.

10. Board President Robert Laverty and Association President Ellen Ogintz each submitted a certification in support of their respective positions regarding the summary judgment motion filed by the Board in CE-2010-005. Laverty confirmed that after the MOA was signed an issue arose over whether an item was inadvertently omitted from the MOA, but he also noted salary guides had not been completed. Laverty indicated that the Association's practice was not to engage in negotiations during the summer, thus, the Board anticipated resolving the above issues in late August or early September. Ogintz did not respond to that information. I credit Laverty.

11. Between June 23 and August 31, 2009, several emails were sent by and amongst Association negotiations team members regarding the remaining contract issues. Those emails referred

to telephone calls with the Board's negotiator. In an email of August 24, 2009, reference is made to a conversation with the Board's negotiator who purportedly said the Board might sign-off on certain issues at its meeting scheduled for August 31, 2009.

On August 31, 2009, without any prior notice to or discussions with the Board, the Association filed a Notice of Impasse with the Commission over the status of their negotiations for a new agreement. That Notice of Impasse was docketed as I-2010-049. The Notice of Impasse indicated that the amount of planning period time and salary guides were the principal issues in dispute. Laverty first learned of the Notice of Impasse when a newspaper reporter began calling Board members in early September seeking their statements in response to statements made by Ogintz to the reporter regarding the filing of the Notice of Impasse. A newspaper article was published on September 3, 2009 regarding the contract impasse.

12. Laverty stated that neither Ogintz nor any other Association representative contacted the Board negotiating team or any Board representative to alert them to the Association's intentions nor did the Association make any attempt to reach a joint statement to be released to the public/press prior to the Association filing the Notice of Impasse or speaking to the news media. Ogintz did not dispute that representation. I credit Laverty.

13. In her certification Ogintz makes two final statements:

> 5. It was the belief of the Association negotiations team members that once the MOA was signed, negotiations were effectively concluded.
>
> 6. The Association did not receive the Board's ratification of the collective negotiations agreement until October 21, 2009.

I do not credit Ogintz' statement in paragraph 5 above. While the Association negotiations team might have believed negotiations were concluded on June 16, 2009 when the MOA was signed (despite the fact that salary guides had not been resolved), the record conclusively shows that by June 23, 2009 the Association asserted that an issue over planning time had not been resolved. The many email exchanges between Association officials during the summer of 2009 shows the Association was keenly aware that the MOA had not resolved to its satisfaction all of the issues in negotiations. Consequently, I find that by June 23, 2009, Association team members knew that the negotiations for a new agreement had not been concluded, and based upon Ogintz' statement in her paragraph 6 above, the Association knew such negotiations did not really conclude until the Board ratified the agreement on October 21, 2009.

ANALYSIS

CO-2010-008

A majority representative of a specified unit of public employees and particular positions has the exclusive right to negotiate over the terms and conditions of employment for those employees/positions. Lullo v. IAFF, 55 N.J. 409 (1970). If a public employer deals directly with an employee/employees in that unit to agree upon terms and conditions of employment in deliberate circumvention of its obligation to negotiate with the majority representative, it violates 5.4a(5) of the Act. See Matawan-Aberdeen Reg. Dist. Bd. of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989) and Gloucester Cty. College, H.E. No. 2004-002, 29 NJPER 344 (¶109 2003).

Here, the Association argues that Bolandi, on behalf of the Board, dealt directly with Stein by engaging in discussions with him regarding stipends for the band director and other band positions represented by the Association. In its post-hearing brief, the Association referred to both Exhibits CPA-1 and CPA-2 apparently as evidence of direct dealing between Bolandi and Stein. Curiously, however, the Association in its brief then acknowledges that Ogintz was aware of those communications, but nevertheless, seems to suggest those communications were improper.

The Association's argument that Bolandi dealt directly with Stein in circumvention of the Board's obligation to negotiate band position stipends with the Association, and its reliance on CPA-1 and CPA-2 to prove that point, lacks merit. What the record really shows is that Ogintz authorized Stein to discuss the band positions with Bolandi, that he (Stein) was required to keep Ogintz advised of those discussions which he did, that Bolandi warned Stein that stipends had to be discussed through the Association, that Bolandi never initiated stipend proposals, and that Ogintz never asked either Stein or Bolandi to stop the discussions.

Exhibit CPA-1 was an April 30, 2009 email from Stein to Bolandi informing Bolandi that Ogintz expressed her support for the discussions between them (Stein and Bolandi). In CPA-1 Stein proposed increasing the stipends for the band director and assistant director. Stein sent a copy of the email to Ogintz. Obviously, then, Ogintz was aware of the nature of the discussions between Stein and Bolandi but I found she was not troubled by that information. More important, however, is that the stipend proposal in CPA-1 was not a proposal from Bolandi to Stein. It was from Stein (who had been authorized by Ogintz to engage in the discussions) to Bolandi - hardly an example of Bolandi, the Board's agent, attempting to deal directly with Stein.

In fact, Bolandi then responds to CPA-1. But he doesn't respond to Stein, he responds to Ogintz. In CPA-2 Bolandi, still on April 30, 2009, and not long after CPA-1 was sent, sends a memorandum to Ogintz about the stipends Stein proposed, and Bolandi specifically says he has no problem recommending them to the Board **"if the Association agrees"** (CPA-2 Emphasis added). CPA-2 therefore, if anything, is evidence that Bolandi deliberately avoided dealing directly with Stein, and dealt directly with Ogintz and specifically conditioned any agreement upon the Association's assent. The evidence establishes that Bolandi sought to deal with the Association and not Stein about the band stipends.

The record is replete with similar evidentiary examples contradicting the Association's assertion that Bolandi was circumventing the Board's negotiations obligation to the Association, particularly CPA-4A where Ogintz actually directs Stein to share his (Stein's) proposed job descriptions with Bolandi. Even CPA-4, the email from Stein to Ogintz about the job descriptions concludes with an acknowledgment that his suggestions needed to be negotiated. What is absent in this case is any evidence that Bolandi ever initiated action to deal directly with Stein.

Having reviewed the entire record in CO-2010-008, I find there is no basis upon which to conclude that the Board (Bolandi)

engaged in direct dealing. Consequently, I recommend that the Commission dismiss the Association's charge.

CE-2010-005

Included in their obligation to negotiate over terms and conditions of employment, a public employer and public employee representative have the right to negotiate over and agree upon ground rules for negotiation. Phillipsburg Bd. of Ed., P.E.R.C. No. 83-34, 8 NJPER 569 (¶13262 1982). Such ground rules may limit or condition the parties' communications or release of information to the media about the negotiations upon certain notice requirements or other action.

The Board and Association here reached such an agreement. They agreed that if impasse were reached they would make an attempt to reach a joint statement before going to the media on their own. If they could not agree upon a joint statement they were free to make any statement. The evidence in the CE case conclusively shows that by June 23, 2012 disputes remained in the parties' negotiations for a new collective agreement. Those disputes continued throughout July and August and by the end of August 2009 the Association filed for impasse.

Without making any effort to reach a joint statement about their negotiations, as required by the Ground Rules agreement, the Association made statements to the media about the negotiations. The Association never denied that it made no

effort to reach a joint statement. Rather, in its post-hearing brief the Association argued that the Board was not entitled to summary judgment because a material fact existed as to whether the Association violated Ground Rule No. 9 above.

N.J.A.C. 19:14-4.8(e) provides:

> (e) If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

If material factual issues exist, then summary judgment must be denied. But where the facts are not in dispute, and the movant is entitled to judgment as a matter of law, the motion must be granted. See Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995).

The Association's theory of the case is that once the MOA was signed on June 16, 2009, negotiations were concluded and the ground rules no longer applied. But the Association also seems to argue that certain Board action or inaction justified the Association abrogating the agreed upon ground rules. In its post-hearing brief, it stated:

> The Board's failure to sign the Addendum and salary guides, its failure to resolve the problems with the insurance plan, and its cancellation of the August Board of Education meeting could only have led to the conclusion that any attempts by the Association to issue

> a joint statement of impasse with the Board would have been fruitless.

The Association's material fact argument is specious for two reasons. First, because it is contrary to the Association's stipulation on the record that no material facts existed in the CE case. Second, the record shows that the Association's material fact argument is not supported by the evidence and is, in fact, contradicted by the Association's own actions.

To a large extent, the best chance for expeditious litigation before the Agency is dependent upon the good faith of the parties. The Agency encourages parties to enter into stipulations that will make litigation more efficient. We expect that such stipulations are agreed upon in good faith. When stipulations are abrogated or ignored without substantial basis it casts doubt on the credibility of the party or parties responsible and makes the process more inefficient. Here the stipulation that no material facts existed in the CE case was taken in good faith. There was no substantial basis presented by the Association to justify ignoring that stipulation.

While on June 16, 2009 both parties may have believed negotiations had been concluded (except for the salary guides), I have found that on and after June 23, 2009 both parties knew their MOA had not resolved all issues. This case is not about Association action between June 23 and August 31, 2009, it is about what the Association did after August 31, 2009.

Impasse was a condition precedent to the application of Ground Rule No. 9. By filing the Notice of Impasse on August 31, 2009, the Association was first acknowledging that the MOA had not concluded the parties' negotiations, and it was also acknowledging that the parties were indeed at impasse. Having filed for impasse on August 31, the Association effectively activated Ground Rule No. 9, requiring the parties to attempt to reach a joint statement. The Association made no such attempt before talking to the media about negotiations, thus, it violated Ground Rule No. 9. There is no contrary evidence to that fact, material or otherwise.

Although the Association did not argue a First Amendment right in its post-hearing brief, the Board apparently believed the Association raised that issue earlier in this litigation when, in a letter to a Commission staff agent, the Association argued that it had a First Amendment right to express its position on the status of negotiations, and that right superceded any restriction the ground rules imposed. In its letter to the staff agent, the Association relied upon the free speech rights recognized by the Commission in Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981) to support its position, particularly the following:

> . . . the employee representative has the right to criticize those actions of the employer which it believes are inconsistent

> with that goal [good labor relations]. Id. at 503.

Although both parties generally have the free speech right to criticize each other, they can limit that right through a ground rules agreement as the parties did in this case. Phillipsburg. Since the Association did not raise a free speech issue in its brief, and since the facts do not support a free speech violation, that issue needs no further consideration.

After reviewing the entire record regarding CE-2010-005, I find the Association violated 5.4b(3) of the Act by failing to attempt to reach a joint statement with the Board regarding the status of their negotiations.

Accordingly, based upon the above findings and analysis, I make the following:

CONCLUSIONS OF LAW

1. The Board did not violate 5.4a(1) or (5) of the Act based upon the discussions between Superintendent Bolandi and Music Teacher Stein regarding the band director and other positions.

2. The Association violated 5.4b(3) and derivatively 5.4b(1) of the Act by failing to comply with the Ground Rules for Negotiations agreed upon by the parties.

RECOMMENDATION

I recommend that the Commission **ORDER**:

A. That the Association cease and desist from:

1. Failing to negotiate in good faith with the Board, a public employer of the employees the Association represents concerning terms and conditions of employment, particularly by failing to comply with Ground Rules for Negotiations negotiated and agreed upon by the parties.

B. That the Association take the following affirmative action:

1. Comply with any ground rules for negotiations in the future.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A". Copies of such notice shall, after being signed by the Association's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

C. That the Complaint in CO-2010-008 be dismissed.

Perry O. Lehrer
Hearing Examiner

DATED: July 13, 2012
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by July 23, 2012.

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

THE EAST WINDSOR EDUCATION ASSOCIATION hereby notifies all employees of the East Windsor Regional Board of Education represented by the Association that:

WE WILL cease and desist from failing to negotiate in good faith with the Board, a public employer of the employees the Association represents concerning terms and conditions of employment, particularly by failing to comply with Ground Rules for Negotiations negotiated and agreed upon by the parties.

WE WILL comply with any Ground Rules for negotiations in the future.

Docket No. CO-2010-008, CE-2010-003 & CE-2010-005

East Windsor Education Association
(Association)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"